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Supreme Court of the United States.

OCTOBER TERM, 1904.

M. H. COURTNEY, *Appellant*,

v.

LOUIS A. PRADT, Executor of MERRIT B. ATWATER, deceased, and WILLIAM C. ATWATER. } No. 93.

Reply Brief of Appellees on Motion to Dismiss the Appeal.

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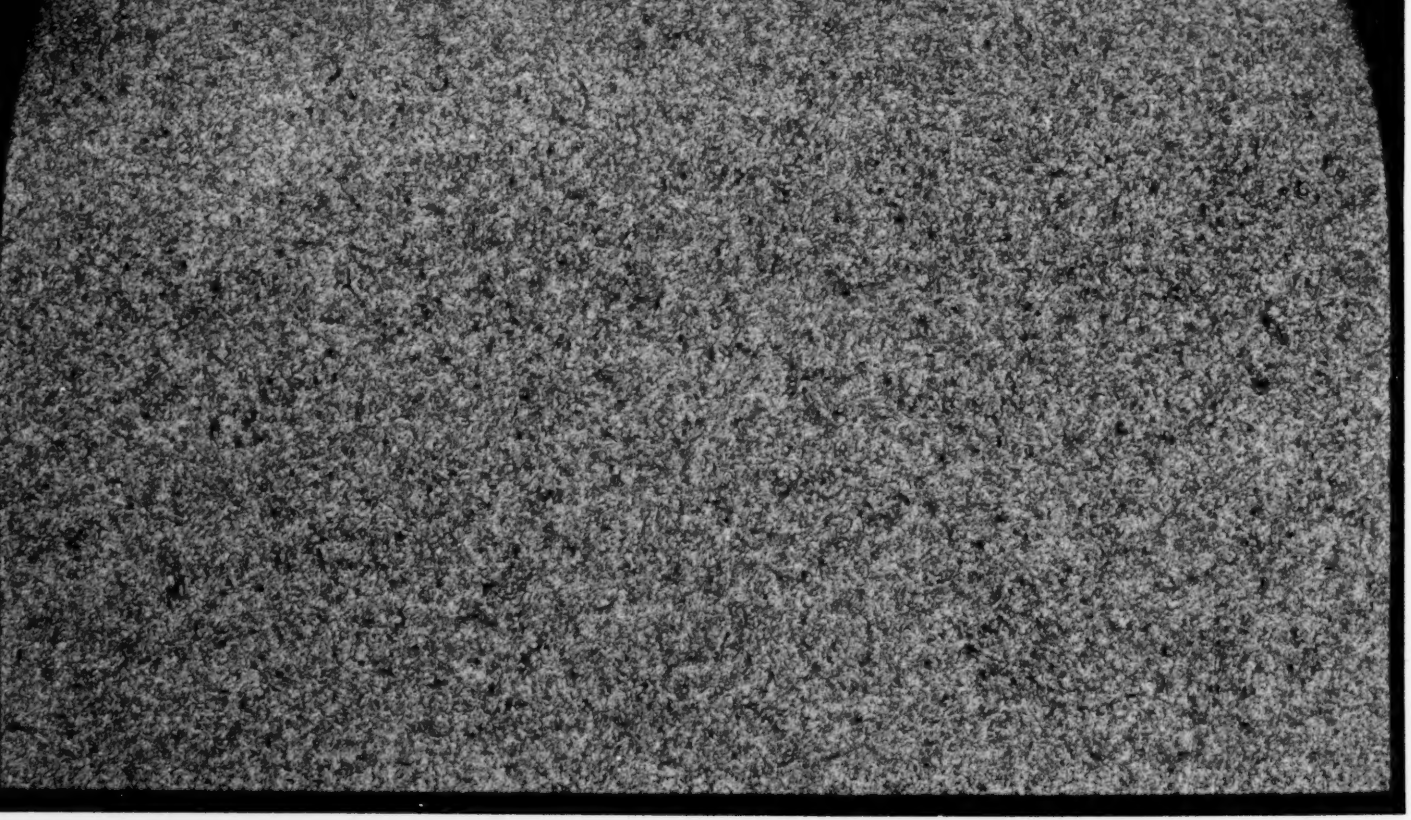

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The discussion of this motion seems to have taken a wider range than we thought possible when we filed our original brief. The plaintiff's motion to remand the case, made before the Circuit Court, did not state the grounds for the motion. The motion was simply that the cause be remanded to the State court from whence it was removed. (See page 12 of record.) The motion might have been made upon various grounds, as that the removal was not had seasonably, or that the necessary diverse citizenship was not shown, or that the Federal court had no jurisdiction from the nature of the action, or because no jurisdiction was acquired by the State court. In fact the defendants' contention that the State court had no jurisdiction over the subject matter of the action or the person, gave the plaintiff the argument that there was no case in court at all, either in the State court or in the Federal court, and that therefore the Federal court had no jurisdiction to dismiss but should remand

and allow the State court to expunge its records; in other words, that there being no jurisdiction whatever, the record filed in the Federal court was a mere intrusion or impertinence. Consequently the motion to remand did not necessarily and by mere force of the motion itself raise a question of Federal jurisdiction. It did not inform the defendant or the court that a Federal question was the basis of the motion to remand.

In addition to the authorities we have already cited, we refer to the case of De Lima *v.* Bidwell, 182 U. S., 1. The action in that case was instituted in the State court of New York, a court of original jurisdiction, to recover duties paid under protest, against the United States revenue collector, and was removed to the Circuit Court of the United States on *certiorari*. In the Federal court the defendant appeared and demurred to the complaint, on the ground that it did not state a cause of action and that the court had no jurisdiction of the cause. The demurrer was sustained on both grounds, and the action dismissed. This court held, on appeal, that the defendant unquestionably had the right to show that the State court had no jurisdiction.

While in this De Lima case there are wide differences of opinion between members of the court upon other questions, we find no difference of opinion upon this question, and the doctrine that the question of jurisdiction of the State court to entertain the action may be raised in the Federal court upon a removal seems to be fully sustained.

In Sheldon *v.* Wabash R. Co. (C. C. Northern Dist. Ill.), 105 F. R., 785, the action was commenced in the State court and removed by the defendant to the Federal court. It was held that the jurisdiction of the Federal court in causes arising under the interstate commerce act was exclusive, and that a State court had no jurisdiction of

such causes. The judgment of the court was that the bill should be dismissed for want of jurisdiction in the State court to entertain it.

In Hummel *v.* Moore, 25 F. R., 380, the action was commenced in the State court and removed by the defendant under the act of 1875. The defendant filed an answer, claiming off-sets which exceeded the jurisdiction of the State court. The Federal court sustained the demurrer of the defendant. While this case is not strictly in point, in the opinion there is some discussion that may be valuable. The court said:

> "In all essential features the case is subject in this court to the limitations and restrictions which would have been applicable in the county court if it had not been removed into this court."

Elliott *v.* Shuler, 50 F. R., 454. This was a special proceeding by the plaintiff as administrator to sell the lands of his intestate to procure assets for the payment of debts, commenced in the Catawba County Superior Court of North Carolina, and removed to the Federal court by a non-resident defendant. There was a motion on the part of the plaintiff to remand to the State court, and a motion on the part of the defendants to dismiss the proceedings. The court said:

> "When there is a total absence of jurisdiction of the subject matter, a Federal court *sua sponte* or on motion of a party at any time will dismiss or remand a cause removed from a State court."

We believe the language of the learned judge in suggesting the remedy by remand is open to criticism in view of the later and better considered authorities.

In Tortat *v.* Hardin Mining & Manufacturing Co. (C. C. Dist. S. Dak.), 111 F. R., 426, where the cause was commenced in the State court and removed by the defendant

to the Federal court, a motion to remand was made by the plaintiff and a motion to dismiss by the defendant on the ground that there was no valid service of process.

In Wabash, &c., R. Co. *v.* Brow, 164 U. S., 271, the action was commenced in Michigan in the State court against a corporation which had no agent or property within the State of Michigan. The defendant appeared in the State court and filed its petition and bond for removal to the Federal court, and the record was duly sent to the Federal court. After the record was filed in the Federal court, the defendant appeared and specially moved the court to set aside the service of process and to dismiss the action for want of jurisdiction of the person of the defendant in the State court from which the cause was removed. The Federal court overruled this motion and a trial was had and judgment rendered against the defendant, under various exceptions taken by the defendant. The case came before this court on writ of error, and among the errors assigned was the refusal of the Circuit Court to grant the motion to dismiss. The court held that the defendant did not waive his right to object to the jurisdiction by applying to remove the cause, and cites with approval the language of Judge Drummond in Atchison *v.* Morris, 11 F. R., 582, as follows:

> "The party has a right to the opinion of the Federal court on every question that may arise in the case, not only in relation to the pleadings and merits but to the service of process; and it would be contrary to the manifest intent of Congress to hold that a party who has the right to remove a cause is foreclosed as to any question which the Federal court can be called upon under the law to decide."

In Goldey *v.* Morning News, 156 U. S., 518, the action was a personal action brought in the State court against

a corporation neither incorporated nor doing business within the State, and not having any agent or property therein, but service of the summons was attempted to be made upon the president, who was temporarily within the jurisdiction. The action was removed to the Federal court on the ground of diverse citizenship, and a motion made by the defendant to dismiss the action because of lack of jurisdiction, and the motion was granted. (See 42 F. R., 112.) This court held that the service of the process was void, and sustained the dismissal of the action. In dismissing the case the court said:

> "For the same reason, service of mesne process from a court of a State, not made upon the defendant or his authorized agent within the State, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Court of the United States after the removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court."

The court said further:

> "The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and can not be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal."

And, again, this court said:

> "Although the suit must be actually pending in the State court before it can be removed, its removal

> into the Circuit Court of the United States does not admit that it was rightfully pending in the State court, or that the defendant could have been compelled to answer therein."

In Hawkins *v.* Pierce, 79 F. R., 452, the action was commenced in the State court and the defendant removed it to the Federal court. After the transfer of the cause to the Federal court, the defendant moved to set aside the sheriff's return, and dismiss the action for want of jurisdiction. The court dismissed the action.

See Martin *v.* B. & O. R. Co., 151 U. S., 673.

In Auracher *v.* Omaha & St. L. R. Co., 102 F. R., 1, the action was commenced in the State court and was removed upon petition by the defendant. The court sustained the motion to dismiss the action for lack of jurisdiction on the part of the State court to entertain the action.

See also Ferguson *v.* Ross, 30 F. R., 161.

This action is purely an action at law. It has no elements of an equity action. If it should be tried in Kentucky, it would be tried as an action at law and not as an action in equity. The ancillary process of attachment or garnishment obtained by the plaintiff may be in form equitable. It may be that the Kentucky statutes mold it into a creditor's proceeding, to subject assets to the payment of whatever indebtedness shall be found due in the principal action upon final judgment. But this ancillary process is dependent upon the principal action. The plaintiff seeks to derive jurisdiction through this process instead of by service of process in the principal action. This merely incidental proceeding, designed to secure satisfaction of whatever judgment is ultimately rendered, does not change the nature of the action itself, nor are the statutes of Kentucky to the contrary. They formulate these proceedings, recognizing fully the true

nature of the action brought here as an action at law. This ought to dispose of the contention of counsel that that action is an equitable action, which the Federal court, by reason of fundamental inability, can not entertain jurisdiction of, and the attempt of counsel to liken the case to that of Cates, 149 U. S., 451, is without point.

The nature of this action brings it clearly within the removal statutes, and this right of removal can not be qualified by the fact that the ancillary remedy of attachment of assets is molded by the Kentucky statutes, into the form of a bill in equity rather than a writ at law. That would be to deprive the defendants in this case of all benefits of the right of removal, and that, too, in a case of a nature such as is unquestionably cognizable by the Federal court to which it was removed. As we have said, the statutes of Kentucky do not attempt nor purport to abridge this jurisdiction of the Federal court, and if they did, to that extent they would be inoperative. (See Goldey *v.* Morning News, 156 U. S., 523, already cited herein.)

> "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress. (Gordon *v.* Longest, 16 Pet., 104.)"

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Additional authorities:
Dillon on Removal - Sec. 201-2
Cook on Stocks &c - " 543.
Black on Pub. Corp. " 604.
Bank of Louisville v. Gray. 84 Ky.
2 Woerner, Admr - Sec. 364.